Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 1998

JASON B.,
Petitioner,
– against –
STATE OF CONNECTICUT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a due process vagueness challenge to Connecticut's "statutory rape" law, which exempts from its purview minors who are not "more than two years older than" their partners, should courts consider the age and likely understanding of a minor in the defendant's shoes in determining what constitutes fair warning and sufficient notice of prohibited activity?

2. Do minors between the ages of 14 and 16 years old possess a fundamental right of privacy to engage in consensual sexual activity with one another, thereby necessitating strict scrutiny review of statutory rape laws that otherwise prohibit such activity?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR WRIT 1
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL & STATUTORY PROVISIONS . . 1
STATEMENT OF THE CASE 2
Nature of the Proceedings 2
Trial Proceedings 4
Appellate Proceedings 6

REASONS FOR GRANTING THE WRIT 6
I. The refusal of the Connecticut Supreme Court to consider the young age of the defendant in analyzing a vagueness claim under the fourteenth amendment to the "safe harbor" exception to the statutory rape law does not conform with this Court's prior rulings in constitutional due process claims challenging a penal statute "as applied." 6
II. The Application of the Statutory Rape Statute to the Consensual Activities of the 16-Year-Old Defendant and his 14-year-old consenting partner, under these circumstances, violates the Defendant's Right to the Equal Protection of the Law. 11

CONCLUSION 17
APPENDIX A-1

TABLE OF AUTHORITIES

FEDERAL CASES

Carey v. Population Services International, 431 U.S. 678 (1977) 14, 15, 16

City of Chicago v. Morales, ___ U.S. ___, 119 S. Ct. 1849 (1999) 8

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 11, 15

Colautti v. Franklin, 439 U.S. 379 (1979) 8

Connally v. General Construction Co., 269 U.S. 385 (1926) 7

Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) 12

Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) 11

Eisenstadt v. Baird, 405 U.S. 438 (1972) 13

In re Gault, 387 U.S. 1 (1967) 14

Goss v. Lopez, 419 U.S. 565 (1975) 14

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) 6, 7

Kolander v. Lawson, 461 U.S. 352 (1983) 7

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 8

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 12

McBoyle v. United States, 283 U.S. 25 (1931) 9

McGinnis v. Royster, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1972) 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 13

Palko v. Connecticut, 302 U.S. 319 (1937) 13

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) ... 13

Plyer v. Doe, 457 U.S. 202 (1982) 12
Prince v. Massachusetts, 321 U.S. 158 (1944) 14
Roe v. Wade, 410 U.S. 113 (1973) 13
Rose v. Locke, 423 U.S. 48 (1975) 9
Skinner v. Oklahoma, 316 U.S. 535 (1942) 13
Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242,
39 L. Ed. 2d 605 (1974) 7
Tinker v. Des Moines School District, 393 U.S. 503 (1969) 14
Village of Hoffman Estates v. Flipside, 455 U.S. 489,
456 U.S. 950 (1982) 7
Washington v. Glucksberg, 521 U.S. 702 (1997) 12
In re Winship, 397 U.S. 358 (1970) 14
Winters v. New York, 333 U.S. 507 (1948) 8

STATE CASES

State v. Jason B. 248 Conn. 543, 729 A.2d 760
(1999) 1, 4, 8, 13
State v. Jason B. 47 Conn. App. 68, 702 A.2d 895
(1997) 1, 3, 9, 15
Bruno v. Civil Service Commission, 192 Conn. 335,
472 A.2d 3328 (1984) 11
Franklin v. Berger, 211 Conn. 591,
560 A.2d 444 (1989) 11, 12
Laden v. Warden, 169 Conn. 540, 363 A.2d 1063 (1975) 12
State v. DeFrancesco, 235 Conn. 426 (1995) 8

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

STATE STATUTES

Conn. Gen. Stat. § 53-21 . . . . . 2, 3
Conn. Gen. Stat. § 53a-1-1(i) 10

Conn. Gen. Stat. § 53a-70(a)(1) 2
Conn. Gen. Stat. § 53a-71(a)(1) 2, 3, 6, 9
Conn. Gen. Stat. § 54-76d 2
Public Act No. 93-340 9

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jason B., a 16-year-old minor adjudged guilty under Connecticut law as a youthful offender, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on May 4, 1999, on the important issues presented herein.

OPINION BELOW

The opinion of the Connecticut Supreme Court on petitioner's direct appeal, which reversed the opinion of the Connecticut Appellate Court and ordered the criminal convictions affirmed, is reported at 248 Conn. 543, 729 A.2d 760 (1999), and is reprinted in the Appendix to this petition at pp. A-23 - A-56. The Connecticut Appellate Court opinion is reported at 47 Conn. App. 68, 702 A.2d 895 (1997), and is reprinted in the Appendix to this petition, at pp. A-1 - A-22.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on March 23, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "...; nor shall any person ... be deprived of life, liberty, or property without due process of law;"

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "...; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Conn. Gen. Stat. § 53a-71(a)(1), as amended by Conn. Public Act 93-340 (1993), states in pertinent part:
A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age *and the actor is more than two years older than such person* . . .. (emphasis supplied)

STATEMENT OF THE CASE

I. The Nature of the Proceedings: The defendant, Jason B., a minor sixteen years of age, was arrested on October 20, 1994 and charged by original information with sexual assault in the first degree, in violation of Conn. Gen. Stat. § 53a-70(a)(1); sexual assault in the second degree, in violation of Conn. Gen. Stat. § 53a-71(a)(1) and risk of injury to a minor, Conn. Gen. Stat. § 53-21. The defendant applied for and received youthful offender status, pursuant to Conn. Gen. Stat. § 54-76d, and a Youthful Offender information was filed on or about February 2, 1995 alleging violations of the same three offenses. Following a court trial before Superior Court Judge David Barry in the Hartford-New Britain Judicial District Courthouse in Hartford, Connecticut, the defendant was adjudged a youthful

offender on June 1, 1995 for violating one count of sexual assault in the second degree, in violation of Conn. Gen. Stat. § 53a-71(a)(1); and one count of risk of injury to a minor, in violation of Conn. Gen. Stat. § 53-21. The court acquitted him on the first count of sexual assault in the first degree. Thereafter on September 15, 1995, the defendant was sentenced to a total effective sentence of two (2) years incarceration, execution suspended after nine (9) months, followed by three (3) years probation with special conditions. The petitioner appealed to the Connecticut Appellate Court, which affirmed the judgment of the trial court. 47 Conn. App. 68, 702 A.2d 895 (1997). The Connecticut Supreme Court granted the defendant's petition for certification on December 10, 1997, 243 Conn. 955, 704 A.2d 806 (1997) on the following four issues:

> 1. Did the Appellate Court properly conclude that the defendant was "more than two years older" than the complainant within the meaning of General Statutes §53a-71(a)(1) where the defendant on the date of the incident was 16 years old and the complainant was 14 years old?
>
> 2. Did the Appellate Court properly conclude that the meaning of the term "year" in General Statutes §53a-71(a)(1)(Rev. 1993) was not unconstitutionally vague and/or violative of the equal protection clause of the United States Constitution as applied to the facts of this case?

3. Did the Appellate Court properly conclude that the state adequately charged the defendant with a violation of General Statutes §53-21 (Risk of Injury) under the facts of this case, where a minor may lawfully engage in sexual intercourse in certain circumstances?

4. Assuming the state properly charged the defendant with a violation of General Statutes §53-21, did the Appellate Court properly conclude that it was not unconstitutionally vague as applied to the facts of this case?

On May 4, 1999, the Connecticut Supreme Court affirmed the decision of the Appellate Court. 248 Conn. 543 (1999). Thereafter the petitioner sought reconsideration of the decision, which was denied on June 16, 1999.

II. Trial Proceedings: Both the complainant (who will be referred hereinafter as "[A]") and the petitioner were students at Enfield High School. [A] was the manager of the school football team, and the petitioner was a player on the team.

On September 21, 1994, [A] attended football practice and performed her usual duties. The petitioner also attended practice, but did not participate because of an injury. [A] noticed that Jason had his arm in a sling, because of a dislocated shoulder. At the end of practice, the petitioner offered [A] a ride to her home, and she accepted, even though she lived directly across the street from the school. The petitioner also agreed to drive another player on the football team to his home.

The petitioner drove toward the home of the other

player, who occupied a rear seat of the car, and [A.] sat in the front passenger seat. During the ride, the petitioner and the other player made some remarks about [A]'s breasts. [A] then lifted up her sweater to display her brassiere, and commented about the size of her breasts. The petitioner remarked aloud to the teammate that he intended to have [A] perform oral sex on him. [A] said nothing in response.

After leaving the other player at his home, the petitioner drove around for a short while and finally entered a cemetery driveway. The cemetery, according to [A]'s calculations, was a distance of 17 telephone poles from her home. The petitioner drove to the rear of the cemetery and parked the car. He and [A.] kissed for a while, and then he unzipped his pants. [A] performed fellatio on Jason for a few seconds, before she sat up, and told him to take her home. The petitioner complied. As he dropped her off, Jason stated that he was going to inform others at school about their activity in the cemetery, and she asked him not to say anything. [A] told nobody about what had occurred until a friend came up to her in school the next day and said, "I know what you did." At trial [A.] testified that the petitioner forced her to perform fellatio, but the trial court concluded that the state failed to sustain its burden of proving beyond a reasonable doubt the element of compulsion.

On the date in question, [A.] was fourteen years old; her birthday being August 16, 1980. The petitioner was sixteen years of age; his birthday being May 9, 1978. The difference between their birthdays is two years, three months and seven days.

III. Appellate Proceedings: On direct appeal to the Connecticut Appellate Court, the petitioner claimed error in the trial court's rejection of his claim that the statute did not apply to him, and that otherwise it was unconstitutionally vague as applied to him and his actions. He also challenged the application of Conn. Gen. Stat. § 53a-71(a)(1) to his consensual activity with another minor. He specifically argued that the statute discriminated among a class of sixteen year olds, and affected his fundamental right to privacy, requiring application of a strict scrutiny standard to determine if the state had a "compelling state interest" in prohibiting the conduct at issue. The petitioner made similar claims to the Connecticut Supreme Court. Both courts rejected the petitioner's claims.

REASONS FOR GRANTING THE WRIT

I. The refusal of the Connecticut Supreme Court to consider the young age of the defendant in analyzing a vagueness claim under the fourteenth amendment to the "safe harbor" exception to the statutory rape law does not conform with this Court's prior rulings in constitutional due process claims challenging a penal statute "as applied."

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The void for vagueness doctrine under the fourteenth amendment encompasses three precepts: (1) the right to fair warning of the effect of a statute; (2) the guarantee

against standardless law enforcement; and (3) the avoidance of restrictions in areas of constitutional rights. Village of Hoffman Estates v. Flipside, 455 U.S. 489, *reh. denied*, 456 U.S. 950 (1982); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Grayned, supra.

In Kolander v. Lawson, 461 U.S. 352, 357 (1983), this court held that due process "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Indeed the entire purpose of the void for vagueness standard is to prohibit the application of criminal statutes to "such a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Smith, supra, 415 U.S. at 575.

While this Court has analyzed the due process notice requirement in terms of whether or not a statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," Connally v. General Construction Co., 269 U.S. 385, 391 (1926), it has not heretofore analyzed a statute under the fourteenth amendment due process clause where an exception – or "safe harbor" clause – is built into the penal provision that by its express terms only applies to minors.

While the defendant contends that consensual sexual activity among teens implicates certain fundamental rights to privacy of these teens; see *infra*; he makes no facial challenge to the statute here, but instead asserts that, as a 16-year-old youth, the statute is unconstitutionally vague *as to him* under the facts

of *this case*. Thus, he claims, that the Court ought to analyze the provision "not more than two years older than" his partner as understood by the typical 16-year old. Thus under this analysis, most 16-year-olds would likely consider themselves to be within two years of age of a 14-year-old, regardless of the particular month in which each was born.

The Connecticut Supreme Court rejected the "reasonable teenager" approach, noting that "vagueness analysis ordinarily does not depend on the individual or categorical capabilities of the defendant." State v. Jason B., supra, 248 Conn. at 557. Yet even that court acknowledged that specific "knowledge possessed by a particular defendant may *undermine* a vagueness challenge . . .." *Id.*, *citing* State v. DeFrancesco, 235 Conn. 426, 446 (1995) (defendant's special training in the handling of felidae made her more knowledgeable than average citizen about the dangerous propensities of a hybrid bobcat).

The "constitutional requirement of definiteness applies more strictly to penal laws than to statutes that exact civil penalties." Winters v. New York, 333 U.S. 507, 515 (1948). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). More recently, this court has expressed enhanced concern about the vagueness of statutes, such as this one, that contain no *mens rea* requirement. City of Chicago v. Morales, ___ U.S. ___, 119 S.Ct. 1849 (1999), *citing* Colautti v. Franklin, 439 U.S. 379, 395 (1979).

Recognizing that a degree of vagueness is endemic in many statutes, an otherwise vague statute may nevertheless pass constitutional muster if its meaning can be fairly ascertained

through judicial opinions or other commonly accepted sources. To make the warning fair, so far as possible, "the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 (1931). References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning. Rose v. Locke, 423 U.S. 48, 50 (1975). Here there were no prior cases interpreting Public Act No. 93-340, and the various legal dictionaries, common law history and cases interpreting the terms "year" and "calendar year" that did exist either supported the defendant's interpretation or obfuscated the issue further. Indeed, even the Connecticut Appellate Court conceded that the term "is not free of ambiguity." State v. Jason B., supra, 47 Conn. App. at 72.

As applied to the instant case, the so-called "statutory rape" statute fails both parts of this test: Conn. Gen. Stat. §53a-71a(1) does not (or should not) apply to the facts of this case and, even assuming *arguendo* that it did, it failed to give fair warning to *this defendant* that his conduct was illegal.

Utilizing this approach in the defendant's vagueness challenge, it necessarily follows that the appropriate analysis requires examination of the consensual activities here from the vantage point of Jason -- a 16-year-old youth.[1] In the absence of any prior judicial gloss discussing the term "more than two years older" in this context, it was entirely reasonable for Jason

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[1] Of course, by its very definition, "two years" under Section 53a-71(a)(1) only applies to the small subset of youths between the ages of 15 and 17, since the unrestricted age of consent for sexual intercourse is 16, and the younger partner must be at least 13 years old.

to believe that he was not more than two years older than A., his 14-year-old partner. Either because "common parlance" recognizes that a 16-year-old is not more than two years older than a 14-year-old (as the prosecution conceded in its appellate brief), or because a high school junior is not seen as more than two *school* years ahead of a freshman, neither Jason nor any other reasonable 16- year-old could possibly have understood the statute to prohibit such consensual activity with a 14-year-old partner.

Sexual exploration by high school students is sometimes an awkward and painful -- but inevitable -- step in their physical and social development. While the legislature has every right to pass "bright line" moral laws forbidding certain activities, as it did prior to the amendment in 1993, it cannot redraw the "foul line" so that it is difficult to find unless someone like Jason trips over it.

When one considers the admitted ambiguity surrounding the term "calendar year,"[2] it was reasonable for Jason to believe that he was not more than two *calendar* years older than A. A calendar year usually begins January 1st and ends December 31st. Whether or not this commonly cited definition is the only acceptable one is not relevant to the defendant's vagueness challenge. It is certainly no less reasonable than the Connecticut courts' determination that "two years" necessarily means 24 months. For these reasons, the Court should grant certiorari to review the approach taken by the Connecticut Supreme Court.

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[2] Conn. Gen. Stat. § 53a-1-1(I) defines "year" as "calendar year."

II The Application of the Statutory Rape Statute to the Consensual Activities of the 16-Year-Old Defendant and his 14-year-old Consenting Partner, Under These Circumstances, Violates the Defendant's Right to the Equal Protection of the Law.

The Equal Protection Clause of the fourteenth amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). As the Connecticut Supreme Court has interpreted this provision, in order to implicate the constitutions' equal protection clause, "it is necessary that the state statute in question, either on its face or in practice, treat persons standing in the same relation to it differently." Franklin v. Berger, 211 Conn. 591, 596, 560 A.2d 444 (1989).

> To determine whether a particular classification violates the guarantees of equal protection, the court must consider 'the character of the classification; the individual interest affected by the classification; and the governmental interests asserted in support of the classification.' Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Where the classification impinges upon a fundamental right or impacts upon an 'inherently suspect' group, it will be subjected to strict scrutiny and will be set aside unless it is justified by a compelling state interest. Id. 342; Bruno v. Civil Service

> Commission, 192 Conn. 335, 345, 472 A.2d 3328 (1984); Laden v. Warden, 169 Conn. 540, 542, 363 A.2d 1063 (1975). On the other hand, where the classification at issue neither impinges upon a fundamental right nor affects a suspect group 'it will withstand constitutional attack if the distinction is founded on a rational basis.' Laden v. Warden, supra, 543; see also McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 35 L.Ed. 2d 282 (1972); Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

Franklin v. Berger, supra, 211 Conn. at 595.

The standard for reviewing a state statute under the Equal Protection Clause depends on the right or classification involved. If the law invidiously discriminates against a "suspect class" or affects a "fundamental right," the statute will pass constitutional muster only if it survives strict scrutiny review. Plyer v. Doe, 457 U.S. 202, 216-17 (1982); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). Laws subject to strict scrutiny will survive such review only if they are narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702 (1997). Here, the defendant maintains that § 53a-71(a)(1) discriminates because the so-called "safe harbor" provision affects both his and his partner's fundamental right to privacy. Nevertheless the Connecticut Supreme Court rejected petitioner's claim for strict scrutiny analysis, stating that the defendant's claim that the constitution provides 16-year-old minors the fundamental right to engage in consensual sexual relations with other minors was

"a dubious assertion at best." 248 Conn. at 561. That court held, instead, that the right to privacy did not extend to the activities of minors, and somehow confused the *right* to privacy with the *expectation* of privacy in the particular place where the activity occurred – in a parked car in a secluded cemetery driveway. Id.

The petitioner concedes that the federal constitution does not explicitly mention a right of privacy. However, in a long line of cases this Court has recognized that a right of personal privacy, and a guarantee of certain areas or zones of privacy, do exist. The roots of the right to privacy have been found in the concept of liberty guaranteed by the first section of the fourteenth amendment. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court's decisions concerning the right to privacy make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in this guarantee of personal privacy. Palko v. Connecticut, 302 U.S. 319, 327 (1937). This right to privacy has been extended to activities relating to procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972); and a woman's decision to terminate her pregnancy. Roe v. Wade, 410 U.S. 113 (1973). Moreover the right clearly applies to minors:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). *See*

Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School District, 393 U.S. 503 (1969). *See also* In re Gault, 387 U.S. 1 (1967); In re Winship, 397 U.S. 358 (1970). As a plurality of this Court has stated:

> The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. . . . Certain principles, however, have been recognized. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. [W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

Carey v. Population Services International, 431 U.S. 678, 694 (1977) (citations and internal quotations omitted).[3]

Although it is true that the state has somewhat broader authority to regulate the activities of minors; Prince v. Massachusetts, 321 U.S. 158, 170 (1944); regulations that treat minors differently than adults with respect to fundamental rights

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[3] There is a certain irony that the constitutional cases that establish the fundamental right of minors to privacy would grant them the right to choose abortions, but not to the activity that necessitated that medical procedure in the first place. Furthermore, the petitioner is not advocating for wholesale sexual activity of children. On the contrary, it is the Connecticut legislature that has set a "cut off" age of thirteen by decriminalizing criminal activity involving consenting minors between the ages of 13 and 17, provided that the one is not "more than two years older" than the other.

nevertheless require courts to determine whether there is "any significant state interest . . . that is not present in the case of an adult." Carey, supra, 431 U.S. at 693.

Thus, where § 53a-71(a)(1) regulates the sexual relations of minors -- clearly a fundamental right for adults -- the statute's regulation merits strict scrutiny analysis. Accordingly, the express statutory exemption, since it provides a "safe harbor" for the activities of youths between the ages of 15 and 17 (who are "no more than two years" older than minors between the ages of 13 and 15), can only survive equal protection analysis if it serves a compelling state interest and is narrowly tailored to serve that interest. Cleburne, supra, 473 U.S. at 440.

In the present case, the prosecution offered no compelling interest to justify the disparate treatment among 16-year-olds under the "safe harbor" provision of § 53a-71(a)(1). There is no reason that consensual sexual activity between a 14- and 16-year-old should be treated differently than the same activity between a 14-year-old and one who is, say, 16 years and three months old. The legislative history certainly makes no effort to note a distinction. The absence of any legislative findings about the harm to teens from mutual consensual sexual activity undercuts the Connecticut courts' conclusions that the legislation helps to prevent pregnancy, reduce the spread of sexually transmitted diseases and stop "more sexually experienced persons [from] tak[ing] advantage of those substantially younger . . .." 47 Conn. App. at 81. The first two proffered reasons apply equally to adults, and fail to consider that the Connecticut statute is gender neutral. The third does

not apply at all here since a minor who is approximately two years less in age is not "substantially younger" than his or her partner. It is also apparent that the Connecticut Supreme Court, in applying the lowest "rational basis" level of review, offered these justifications for the statute despite the absence of legislative history or findings to support these conclusions. This, of course, is insufficient. As this Court has stated:

> It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Carey, supra, 431 U.S. at 696.

Moreover, where the legislature has, in effect, deemed 14-year-olds capable of consenting to intercourse by decriminalizing the act when performed with partners who are near in age -- i.e. "no more than two years" apart, then these 14-year-olds possess the same fundamental right to privacy in their intimate relations. There can be no compelling state need to regulate, indeed criminalize, such conduct between consenting teenagers merely because one of them is 27 months -- or 24 months and one day -- older than the other. Without an expressed compelling state need for such regulation, and data to support it, the discriminatory application of the statute violates

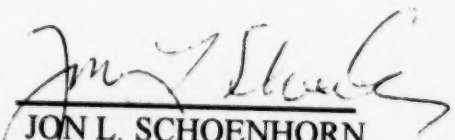
the defendant's right to equal protection.

Accordingly, for all the reasons set forth above, this Court should grant certiorari to review the contrary decision of the Connecticut Supreme Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully Submitted,
JASON B.

BY: 

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APPENDIX

APPENDIX
TABLE OF CONTENTS

Decision of Appellate Court in State v. Jason B. A-1

Decision of Supreme Court in State v. Jason B. A-23

Order Re: Reconsideration and Reargument A-57

STATE of Connecticut

v.

JASON B. (FN*)

No. 15323.

Appellate Court of Connecticut.

Argued May 1, 1997.

Decided Oct. 28, 1997.

Juvenile was adjudicated a youthful offender by the Superior Court, Judicial District of Hartford-New Britain, Barry, J., upon determination that he had committed crimes of sexual assault and risk of injury to a child. He appealed. The Appellate Court, Shea, J., held that: (1) 16-year-old juvenile who had sex with 14-year-old victim was more than "two years" older than victim; (2) sexual assault statute did not violate juvenile's equal protection rights; and (3) neither statute under which juvenile was prosecuted was unconstitutionally vague as applied.

Affirmed.

*896 Jon L. Schoenhorn, Hartford, with who, on the brief, was Alice M. Sexton, for appellant (defendant).

Carolyn K. Longstreth, Asst. State's Atty., with whom were Herbert Carlson, Asst. State's Atty., and, on the brief, James E. Thomas, State's Atty., for appellee (State).

Before LANDAU, DUPONT and SHEA, JJ.

SHEA, Judge.

Following a trial to the court, the defendant appeals from the judgment adjudicating him to be a youthful offender, in

violation of General Statutes§54-76b, by having committed the crimes of sexual assault in the second degree in violation of General Statutes [47 Conn.App. 70] § 53a-71(a)(1), (FN1) and injury or risk of injury to a child in violation of General Statutes§53-21. (FN2) He claims that the finding of a violation of§53a-71(a)(1) is incorrect because (1) that statute does not apply to him as he was not more than two years older than the victim, (2) it is unconstitutionally vague as applied to the circumstances of this case and (3) it deprives the defendant of equal protection of the law as guaranteed by the fourteenth amendment of the federal constitution. The defendant also maintains that the finding of a violation of § 53-21 must be reversed because (1) the evidence adduced by the state to prove the charge of risk of injury to a child was insufficient to establish his guilt and (2) that statute is unconstitutionally vague as applied to the conduct of the defendant on which the violation is based. We affirm the judgment of the trial court.

The trial court reasonably could have found the following facts from the evidence presented. Both the victim and the defendant were students at Enfield High School. The victim was the manager of the school football team, and the defendant was a player on the team.

On September 21, 1994, the victim attended football practice and performed her usual duties. The defendant also attended practice, but did not participate because of an injury. At the end of practice, the defendant [47 Conn.App. 71] offered the victim a ride to her home, and she accepted. The defendant also agreed to drive another player on the football team to his home.

The defendant drove toward the home of the other player, who occupied a rear seat of the car, and the victim sat in the

front passenger seat. During the ride, the defendant and the other player made some remarks about the victim's breasts. The defendant also said he intended to have the victim perform oral sex on him.

After leaving the other player at his home, the defendant drove around for a short while and finally entered a cemetery driveway. He drove to the rear of the cemetery and parked the car. He and the victim kissed for *897 a while, and then he unzipped his pants. At trial the victim testified that the defendant forced her to perform fellatio, (FN3) but the trial court concluded that the state failed to sustain its burden of proving beyond a reasonable doubt the element of compulsion.

On the date of the incident, September 21, 1994, the victim was fourteen years old, her birthday being August 16, 1980. The defendant was sixteen years of age, his birthday being May 9, 1978. The difference between their birthdays is two years, three months and seven days.

I

[1] The trial court concluded that the defendant had violated the following provision of General Statutes § 53a-71: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and:
(1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person...." The defendant maintains that, in [47 Conn.App. 72] common parlance, age differences are calculated by comparing the birth years of the persons involved, without regard to the days or months of their births, and, therefore, the age difference between him, born in 1978,

and the victim, born in 1980, does not exceed two years. He also contends that the phrase "more than two years older" is ambiguous because of the provision of General Statutes § 1-1(I) that "the word 'month' shall mean a calendar month, and the word 'year' a calendar year, unless otherwise expressed." Relying on the standard definition of calendar year as "[t]he period from January 1st to December 31st, inclusive, of any year"; Ballentine's Law Dictionary (3d Ed.1969); the defendant argues that a sixteen year old person can never be more than two calendar years older than one of fourteen years, even though there may be more than twenty-four months between their birth dates. We agree with the defendant that, if there is ambiguity in § 53a-71(a)(1), the construction most favorable to him must be adopted. State v. McGann, 199 Conn. 163, 177, 506 A.2d 109 (1986).

[2] The term "calendar year," by itself, is not free of ambiguity. Webster provides two definitions: "1: a period of a year beginning and ending with the dates which are conventionally accepted as marking the beginning and end of a numbered year (as Jan. 1 and Dec. 31 in the Gregorian calendar) 2: a period of time equal in length to that of the year in the calendar conventionally in use (as in the Gregorian calendar 365 days or when a Feb. 29 is included 366 days)." Webster's Third New International Dictionary. Black's Law Dictionary also provides two definitions: "The period from January 1 to December 31 inclusive. Ordinarily calendar year means 365 days except leap year, and is composed of 12 months varying in length." Black's Law Dictionary (6th Ed.1990). Judicial interpretation of the term has produced a variety of results, some of which cannot be [47 Conn.App. 73] reconciled with either definition. See, e.g., Hawksley v. New Hampshire Interscholastic Athletic Assn., Inc., 111 N.H. 386, 387-88, 285 A.2d 797 (1971) (ineligibility

suspension of high school athlete for one calendar year beginning May, 1971, expired on December 31, 1971); In re Vernon's Estate, 62 N.Y.S.2d 683, 684 (1946) (trust provision authorizing payment from trust principal of $5000 each calendar year construed to allow such payment to be made in each twelve month period following death of testator).

In any event, "[t]he provisions of [§ 1-1], concerning the construction of statutes, [were] not intended to limit the power of the legislature in the enactment of laws, nor to affect the construction of laws when enacted, where the legislative intent is clear." Lew v. Bray, 81 Conn. 213, 217, 70 A. 628 (1908). "They are but legislative enactments and must yield to the later expression of the legislative will." Atwood v. Buckingham, 78 Conn. 423, 426, 62 A. 616 (1905). "The letter of a statute cannot prevail against the plainly indicated intent of the legislature." Brown's Appeal, 72 Conn. 148, 150, 44 A. 22 (1899); see Spring v. Constantino, 168 Conn. 563, *898 572, 362 A.2d 871 (1975); Dostmann v. Zoning Board of Appeals, 143 Conn. 297, 300, 122 A.2d 19 (1956).

Although the term "years" as used in § 53a-71(a)(1) is not ambiguous, the defendant contends that an ambiguity is created by §1-1(I), which declares that "the word 'year' [shall mean] a calendar year, unless otherwise expressed." When viewed in the light of its evident purpose and legislative history, however, we conclude that§53a-71(a)(1) is not ambiguous. As the defendant concedes, the consequence of construing the statute to apply only when more than two calendar years have elapsed between the birth dates of the victim and the actor is to preclude its application to persons less than three years older than the victim. If the legislature contemplated that result, it chose a novel way of [47

Conn.App. 74] expressing its intention when it used the phrase "more than two years older." "Furthermore, we note that if there are two possible interpretations of a statute and one alternative proves unreasonable or produces the possibility of bizarre results, then the more reasonable alternative should be adopted.... The law favors a rational statutory construction and we presume that the legislature intended a sensible result." (Citation omitted.) State v. Parmalee, 197 Conn. 158, 165, 496 A.2d 186 (1985).

Section 53a-71(a)(1) was enacted in 1993 as an amendment to a bill that lowered the age of consent in the statutory rape provision to sixteen years. Public Acts 1993, No. 93-340,§2. The language of the amendment is similar to§213.3(1) of the Model Penal Code. (FN4) The commentary on that provision of the code explains that the proposed exemption when the age disparity between the participants in sexual intercourse does not exceed the proposed limit was a response "to the problem of the imposition of liability on a person of contemporary age and experience by limiting liability to cases where the actor is at least four years older than the underage person." American Law Institute Model Penal Code and Commentaries (1980)§213.3(1), comment, p. 385. The effect of the amendment was to render the person who is more than two years older than the other participant in sexual intercourse criminally liable while exempting a person less than two years older than his or her sexual partner from such liability.

[47 Conn.App. 75] In discussing the amendment, the legislators often used the phrase "within two years of age of each other" or its equivalent in referring to those exempt from criminal liability pursuant to the amendment. (FN5) They noted such concerns as avoiding criminal records for young persons and the desirability of referring minors "less than two

years apart in age" to the department of children and youth services (now the department of children and families). (FN6)

*899 The statute applies to sexual intercourse, consensual or not, when one participant is within the thirteen through fifteen age bracket and the other, on whom criminal liability is imposed, is more than two years older. The legislative purpose was to discourage older youths from having sexual relations with youths with less physical and mental development, maturity and experience. A two year age disparity was established as the maximum permissible to qualify for the exemption created by the amendment. The line of two years drawn by the legislature would be significantly distorted if calendar years were used in calculating the difference [47 Conn.App. 76] in ages of the participants. Persons born after January 1 of any year would not begin their first calendar year until January 1 of the next year and could have almost a full year more of maturity than those born in December of the same year, even though their ages in calendar years would be the same. Such an absurd result was never intended by the legislature, despite the provision in§1-1(I) that year means a calendar year. We must assume that the legislature intended that§53a-71(a)(1) should be applied uniformly when the age disparity exceeds two years as calculated on the basis of birth dates and did not intend to create a special method of calculating the disparity based on calendar years that would be advantageous to those born early in a calendar year. (FN7) We conclude that the term years as used in§53a-71(a)(1) does not mean calendar year but refers to a period of 365 days or 366 days in a leap year.

II

[3] The defendant's challenge to§53a-71(a)(1) on the ground that it is void for vagueness is based on the same claimed ambiguity we have discussed in part I. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). "[A] law forbidding or requiring conduct in terms so vague that [persons] of common intelligence must necessarily guess [47 Conn.App. 77] at its meaning and differ as to its application violates due process of law." Baggett v. Bullitt, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964); see State v. Indrisano, 228 Conn. 795, 802, 640 A.2d 986 (1994); State v. Schriver, 207 Conn. 456, 460, 542 A.2d 686 (1988).

As a sequel to his claim that the age disparity between him and the victim should be calculated in calendar years pursuant to§1-1(I), the defendant argues that, even if this court rejects that construction of§53a-71(a)(1), a person of common intelligence, especially a sixteen year old youth, might reasonably have concluded otherwise, at least prior to any judicial determination of the issue. The defendant does not claim that the statute is invalid on its face, but only that it is unconstitutionally vague as applied to him under the facts of this case. He concedes that judicial construction of the statute will remove the ambiguity claimed and clarify the conduct prohibited. He maintains that the lack of some judicial gloss providing fair notice prior to his encounter with the victim renders the statute inapplicable to him.

"That ignorance or mistake of law will not excuse an act in

violation of the criminal laws is a principle so universally accepted as to be axiomatic." 21 Am.Jur.2d 278, Criminal Law § 142 (1981). "A mistake of law ... even if it is assumed to be honest, is not a valid defense." State v. Tedesco, 175 Conn. 279, 288, 397 A.2d 1352 (1978). In this state, that doctrine has been modified by General Statutes§53a-6(b), (FN8) but not in such a [47 Conn.App. 78] manner *900 as to exempt the defendant from criminal liability. The circumstance that he was only sixteen years old is similarly not helpful because our statutes follow the common law rule that imposes such liability on offenders who have attained the age of fourteen years at the time of their crimes. See 21 Am.Jur.2d 158, Criminal Law§38 (1981); see also General Statutes§46b-127.

[4] We agree with the defendant that, except for first amendment cases, an appropriate test of vagueness is whether the law as applied to the circumstances of the case creates doubt about the legality of the defendant's conduct. See In re John C., 20 Conn.App. 694, 696, 569 A.2d 1154 (1990). In this case, however, even if calendar years are used in calculating the ages of the defendant and the victim, the defendant remains more than two years older than the victim. Even if we assume that the term calendar year means exclusively the period beginning January 1 and ending December 31 of any year, the first calendar year of the defendant's life began on January 1, 1979, approximately seven and one-half months after his birth on May 9, 1978, and ended on December 31, 1979. On the date of his encounter with the victim, September 21, 1994, according to the defendant's analysis, his age in calendar years would have been fifteen instead of sixteen.

[47 Conn.App. 79] If the same methodology is used in

calculating the victim's age, she would have been thirteen on that date instead of fourteen. Her first calendar year began on January 1, 1981, almost five months after her birth on August 16, 1980, and ended on December 31, 1981. On September 21, 1994, she would have completed only thirteen calendar years. The difference between her age and that of the defendant, however, would be two calendar years, three months and seven days, and he would still be more than two calendar years older. (FN9) The conclusion of the trial court that the defendant had violated§53a-71(a) would remain undisturbed unless the phrase "more than two years older" can be construed to mean "more than three years older." The defendant contends it should be so interpreted, but such a construction cannot be reconciled with the language of the statute.

We conclude that§53a-71(a)(1) is not unconstitutionally vague as applied to the defendant in this case.

III

[5] The defendant's final attack on the constitutionality of§53a-71(a)(1) is that "[t]here is no reason that consensual sexual activity between a fourteen [year old] and [a] sixteen year old should be treated differently than the same activity between a fourteen year old and one who is sixteen years and three months." He claims that the statute "discriminates on the basis of age, i.e., within the class of sixteen year olds, and affects his fundamental right to privacy." On those grounds, he claims a violation of the equal protection [47 Conn.App. 80] clause of the fourteenth amendment under which the "strict scrutiny test" must be applied to determine whether the *901 statute is justified by a "compelling state interest." He also claims that the different treatment under the statute

accorded to sixteen year olds whose sexual partners are less than two years younger and those whose sexual partners are slightly more than two years younger does not survive the alternative "rational basis" test of validity under the equal protection clause.

The defendant misreads the statute in claiming that it subjects sixteen year olds as a class to discriminatory treatment. Section 53a-71(a)(1) simply makes it a crime for any person to have sexual intercourse with a youth within the thirteen to fifteen years age bracket when the difference between their ages exceeds two years. There is no maximum age for the older person who engages in such an activity. All persons who have sexual relations with youths of thirteen to fifteen years and who are more than two years older than those youths are subject to criminal liability. Since persons of sixteen years have not been singled out by the statute for adverse treatment, they do not constitute a class, let alone a suspect class. See, e.g., State v. McDougal, 241 Conn. 502, 514, 699 A.2d 872 (1997).

With respect to the defendant's claim that he has a fundamental right to have sexual relations with consenting partners, §53a-71(a)(1) impinges on that right only by precluding such activities with those within the thirteen to fifteen years bracket who are more than two years younger. That restriction is amply justified, however, by a compelling state interest and serves to moderate the severity of our former statutory rape statute, which contained no such exemption for persons having intercourse with anyone under the age of consent. There are many considerations that support the conclusion that the state has a compelling interest in restricting teenage sexual activity, some of which were [47 Conn.App. 81] mentioned by the legislators who approved the statute.

The prevention of pregnancy, reduction of sexually transmitted diseases, and limitation of the opportunity of more sexually experienced persons to take advantage of those substantially younger are concerns of significant importance to society.

As for the argument that there is no rational basis for criminalizing consensual intercourse between youths falling minimally outside the two year age difference permitted by the statute, as in this case when the defendant is only three months and seven days beyond the age difference tolerated by§53a-71(a)(1), the same claim can be raised against any statute that draws a precise line based on age. We are not aware of any authority that has invalidated a statute simply because it makes no allowance for persons who exceed the statutory limit by only a few months.

We conclude that§53a-71(a)(1) does not violate the defendant's constitutional right to equal protection of the laws.

IV

[6] The defendant's claim that the evidence was insufficient to support the finding of the trial court that he had violated§ 53-21, which makes it a crime to injure or risk injury to or impair the morals of children under sixteen years of age, does not question the sufficiency of the evidence concerning any of the operative facts recited by the trial court in its memorandum of decision. This claim involves (1) the sufficiency of the third count of the information charging the defendant with the risk of injury offense and (2) the applicability of the risk of injury statute to the circumstances of this case in which the trial court found that the state had not proved compulsion beyond a reasonable doubt.

[47 Conn.App. 82]A

The third count of the information, accusing the defendant of being a youthful offender by violating§53-21, alleged that he had "wilfully and unlawfully caused a child under the age of sixteen (16) years, namely [the victim], age 14, to be placed in a situation where her morals were likely to be impaired and did an act or acts likely to impair the morals of said child, namely, transporting her into an isolated area where he compelled her to engage in sexual intercourse and by engaging in sexual intercourse with her...." We agree with the state that the use of the conjunction "and" rather than "or" *902 was appropriate for the purpose of alleging alternate ways of committing the same crime. State v. Chapman, 229

Conn. 529, 543, 643 A.2d 1213 (1994). The defendant claims, however, that the failure of the state to allege in the third count the difference in age between him and the victim deprived him of fair notice that he could be found guilty of risk of injury on the basis of that age difference. The second count of the complaint, charging sexual assault in the second degree in violation of§53a-71(a)(1), did set forth the dates of birth of the victim and the defendant and alleged further that he was more than two years older than she. The third count made no reference to the allegations of the second count as permitted by Practice Book § 618. (FN10)

Our risk of injury statute, § 53-21, however, applies to "[a]ny person who ... wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that ... the morals of [47 Conn.App. 83] such child are likely to be impaired, or does any act likely to impair the ... morals of any such child...." Although the age of a victim must be less than sixteen, the statute establishes no age requirement for the actor, who may be "any person." It was not essential, therefore, for the third count to specify the difference in the ages of the victim and the defendant. The defendant could not reasonably have read the information to charge him only with compelling the victim to engage in sexual intercourse because it also alleges that he committed the offense "by engaging in sexual intercourse with her."

B

The defendant claims that § 53-21 does not apply to his conduct with the victim because § 53a-71(a)(1) allows children "thirteen years of age or older but under sixteen years of age" to engage lawfully in consensual sexual intercourse with any person not more than two years older. He relies on

State v. Perruccio, 192 Conn. 154, 471 A.2d 632, appeal dismissed, 469 U.S. 801, 105 S.Ct. 55, 83 L.Ed.2d 6 (1984), in which the court held that it would be unconstitutional to apply § 53-21 to a teacher who was found to have had sexual intercourse, which may have been consensual, with a fifteen year old student at a time when other provisions of the penal code indicated that a person of that age could lawfully consent to that activity. "[F]aced with the anomalous situation of a fifteen year old who may consent and willingly participate in sexual activity and still initiate the prosecution of her 'partner' under § 53-21," the court determined that, if there was consent, that statute was inapplicable because the teacher would not have been provided with fair warning that his conduct was prohibited. Id., at 164-65, 471 A.2d 632.

[7] The defendant's reliance on Perruccio is misplaced, however, because in this case there is no conflict [47 Conn.App. 84] between the statutes with respect to the age of consent. Both §§ 53-21 and 53a-71(a)(1) apply to the protected class of children under sixteen years. Within that class the latter statute creates an exemption when the actor is not more than two years older than the person with whom sexual intercourse occurred. The defendant clearly does not qualify for that exemption because he is more than two years older than the victim. Perruccio would preclude the prosecution for a violation of § 53-21 of one who does qualify for the exemption if the prosecution is based solely on consensual intercourse.

[8] The defendant argues that the victim's morals were no more likely to be impaired, as alleged in the third count, by engaging consensually in sexual intercourse with him than by similar conduct with a younger person who was exempted under the statute. That argument overlooks the legislative

history of the exemption provision for participants in sexual intercourse when the difference in their ages does not exceed two years. As mentioned previously, some legislators were concerned about giving young *903. persons a criminal record and expressed a preference for referring those within the two year exemption to the department of children and families. No legislator contended that a person qualifying for the exemption would be less likely to impair the morals of a child. The resulting impairment of morals may well be the same whether the actor is more or less than two years older than the underage sexual partner. The legislature, nevertheless, might reasonably have concluded that the exemption was an appropriate response "to the problem of the imposition of liability on a person of contemporary age and experience." American Law Institute Model Penal Code and Commentaries § 213.3(1). The exemption was a recognition of the reality of teenage sexual relations in modern society and an attempt to ameliorate some of the consequences without removing entirely the legal barrier to [47 Conn.App. 85] sexual relations with those under the age of consent. In no way does it affect the prosecution for impairment of the morals of a child under sixteen years of age pursuant to § 53-21 of one who has engaged in sexual intercourse with an underage teenager more than two years younger.

V

The defendant's claim that § 53-21 is unconstitutionally vague is grounded on the same requirement of our federal constitution discussed in part II in relation to the defendant's claim that § 53a-71(a)(1) is unconstitutionally vague. A penal statute must define the crime involved "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." Kolender v. Lawson, supra, 461 U.S. at 357, 103 S.Ct. at 1858.

[9] The defendant claims that, because § 53a-71(a)(1) legalizes sexual intercourse between the victim and anyone not more than two years older, the application of § 53-21 to such conduct would be unconstitutional. Although that issue is not before us, we agree that such a consequence would be consistent with Perruccio. The defendant, however, gains nothing by that argument because he does not qualify for the exemption in § 53a-71(a)(1) as he is more than two years older than the victim. The vagueness that may render § 53-21 inapplicable to those exempted by § 53a-71(a)(1) does not impair its applicability to the defendant.

On the date of the offense, there existed a significant judicial gloss with respect to § 53-21, of which the defendant must be presumed to have been aware, to the effect that the act of having sexual intercourse with a child under sixteen years of age was a violation of the statute, regardless of whether there was consent by the child. See State v. Plude, 30 Conn.App. 527, 535, 621 [47 Conn.App. 86] A.2d 1342

(1993); State v. Tirado, 21 Conn.App. 449, 457-58, 574 A.2d 252 (1990); In re John C., supra, 20 Conn.App. at 697-99, 569 A.2d 1154. The phrase "does any act likely to impair the ... morals of any such child" includes deliberately touching the intimate parts of a child. See State v. Schriver, supra, 207 Conn. at 463, 542 A.2d 686; see generally General Statutes § 53a-65(8). A fortiori, it would include "sexual intercourse," which § 53a-65 defines as including fellatio. See, e.g., State v. Anderson, 152 Conn. 196, 197, 205 A.2d 488 (1964). We conclude that at the time of the offense the defendant did have fair notice of the criminality of his conduct from the terms of the statute and from judicial opinions interpreting its terms. In relation to his conduct with the victim, therefore, § 53-21 was not void for vagueness.

The judgment is affirmed.

In this opinion the other judges concurred.

FN* In accordance with the spirit and intent of General Statutes § 46b-142(b) and Practice Book § 4166B.2, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

FN1. General Statutes § 53a-71(a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person ..."

FN2. General Statutes (Rev.1993) § 53-21 provides "Injury or

risk of injury to, or impairing the morals of, children. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals are likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

FN3. General Statutes § 53a-65 provides in relevant part: "(2) 'Sexual intercourse' means ... fellatio ... between persons regardless of sex...."

*903_ FN4. Section 213.3(1) of the Model Penal Code provides: "A male who has sexual intercourse with a female not his wife ... is guilty of an offense if: (a) the other person is less than [16] years old and the actor is at least [4] years older than the other person." Although the code recommends "at least [4] years older" as the permissible age difference between the actor and the other person, the commentary on § 213.3(1) explains that "[t]he age is bracketed ... to indicate that the precise differential is one on which reasonable people may disagree." American Law Institute Model Penal Code and Commentaries (1980) § 213.3(1), comment, p. 386.

FN5. "[The amendment] also modifies the strictness of our law when the sexual activity is between people [who are] within two years of each other." 36 H.R.Proc., Pt. 29, 1993 Sess., p. 10450, remarks of Representative Richard D. Tulisano. "[W]e deal with one class of sexual activity which is removed from the statutory rape sanctions in our current statutes and that is where children between the ages of 13 and 18 engage in sexual intercourse and they are within two years

of each other in age." 36 H.R.Proc., Pt. 29, 1993 Sess., pp. 10457-58, remarks of Representative Moira K. Lyons.

FN6. "This amendment cleans up what we had intended originally in the language which [is] to ensure when intercourse occurs between two individuals, two minors who are less than two years apart in age, that the matter would be handled by DCYS...." 36 S.Proc., Pt. 13, 1993 Sess., p. 4585, remarks of Senator George Jepsen.

"There is deep concern among many people about establishing a criminal record and we are trying to avoid that. But once again we need to make a public statement that this General Assembly does not support early teenage sexual activity." 36 H.R.Proc., Pt. 29, 1993 Sess., pp. 10463-64, remarks of Representative Reginald L. Jones, Jr.

FN7. If courts were obliged to construe the many statutes using the word "year" as meaning calendar year exclusively, the ramifications would be significant. Some state employees entitled to a retirement salary at the age of sixty-five years would have to work almost one year longer in order to become eligible. See, e.g., General Statutes §§ 5-192l and 51-50(a). Whenever a statute contains an age requirement expressed in years, many persons who would fulfill that requirement if year meant simply twelve months, would not qualify if their ages were computed in calendar years.

FN8. General Statutes § 53a-6 provides: "Effect of ignorance or mistake. (a) A person shall not be relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless: (1) Such factual mistake negates the mental state required for the commission of an offense; or (2) the statute defining the offense or a statute

related thereto expressly provides that such factual mistake constitute a defense or exemption; or (3) such factual mistake is of a kind that supports a defense of justification.

"(b) A person shall not be relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless (1) the law provides that the state of mind established by such mistaken belief constitutes a defense, or unless (2) such mistaken belief is founded upon an official statement of law contained in a statute or other enactment, an administrative order or grant of permission, a judicial decision of a state or federal court, or an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."

The defendant has never claimed that this statute provides him with any defense.

FN9. The defendant's argument is not entirely clear but his contention apparently is that the provision "more than two years older" in § 53a-71(a)(1) is not satisfied unless the age difference is greater than three years, ignoring the three months and seven days of the difference between the ages of the victim and the defendant. Thus he contends in his brief that § 53a-71(a)(1) "does not apply to persons who are less than three years older than the minor victim."

FN10. Practice Book § 618 provides in relevant part: "The information shall be a plain, concise and definite written statement of the offense charged.... Allegations made in one count may be incorporated by reference in another count. It

may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed the offense by one or more specified means...."

STATE of Connecticut

v.

JASON B. [FN*]

FN* In accordance with the spirit and intent of General Statutes § 46b- 142(b) and Practice Book § 79-3, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

No. 15841.

Supreme Court of Connecticut.

Argued Nov. 6, 1998.

Decided May 4, 1999.

Juvenile was adjudicated a youthful offender by the Superior Court, Judicial District of Hartford-New Britain, Barry, J., upon determination that he committed crimes of second-degree sexual assault and risk of injury to child. Juvenile appealed. The Appellate Court, 47 Conn.App. 68, 702 A.2d 895, affirmed. Juvenile appealed. The Supreme Court, Borden, J., held that: (1) juvenile was more than two years older than 14-year-old victim; (2) sexual assault statute was not unconstitutionally vague as applied; (3) sexual assault statute did not violate juvenile's equal protection rights; (4) information charging risk of injury to child was adequate; and (5) risk of injury to child statute was not unconstitutionally vague as applied. Affirmed.

McDonald, J., concurred in part and dissented in part and filed opinion.

**764 Jon L. Schoenhorn, Hartford, for the appellant (defendant).

Carolyn K. Longstreth, senior assistant state's attorney, with

whom were Herbert Carlson, assistant state's attorney, and, on the brief, James E. Thomas, state's attorney, for the appellee (state).

Before CALLAHAN, C.J., and BORDEN, KATZ, McDONALD and PETERS, JJ.

*545 BORDEN, J.

The principal issue in this certified appeal is whether the defendant was "more than two years older" than the victim within the meaning of General Statutes § 53a-71 (a)(1). [FN1] The defendant, Jason B., appeals from the judgment of the Appellate Court affirming the trial court's judgment adjudicating him to be a youthful offender in violation of General Statutes (Rev. to 1993) § 54-76b. [FN2] The defendant claims that: (1) at the time of the incident, he was not more than two years older than the victim within the meaning of § 53a-71 (a)(1); (2) § 53a-71 (a)(1) is unconstitutionally vague *546 and violates his right to **765 equal protection as applied to the facts of this case; (3) the state did not adequately charge him with a violation of General Statutes (Rev. to 1993) § 53-21; [FN3] and (4) § 53-21 is unconstitutionally vague as applied to the facts of this case. We affirm the judgment of the Appellate Court.

FN1. General Statutes § 53a-71 provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; or (2) such other person is mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual intercourse; or (3) such other person is physically helpless; or (4) such other person

is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare; or (5) such other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (6) the actor is a psychotherapist and such other person is (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional; or (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor...."

FN2. General Statutes (Rev. to 1993) § 54-76b provides in relevant part: "For the purpose of sections 54-76b to 54-76n, inclusive, 'youth' means a minor who has reached the age of sixteen years but has not reached the age of eighteen years; and 'youthful offender' means a youth who is charged with the commission of a crime which is not a violation of section 53a-70a or a class A felony, who has not previously been convicted of a felony or been previously adjudged a youthful offender, or been afforded a pretrial program for accelerated rehabilitation under section 54-56e, and who is adjudged a youthful offender pursuant to the provisions of said sections...."

FN3. General Statutes (Rev. to 1993) § 53-21 provides:

"Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both." The statute was amended in 1995, but the amendments are not relevant to this appeal. Hereafter, all references to § 53-21 in this opinion are to the 1993 revision, the statute in effect at the time the crime was committed.

The Appellate Court's opinion states the following facts that the jury reasonably could have found. "Both the victim and the defendant were students at Enfield High School. The victim was the manager of the school football team, and the defendant was a player on the team.

"On September 21, 1994, the victim attended football practice and performed her usual duties. The defendant also attended practice, but did not participate because of an injury. At the end of practice, the defendant offered the victim a ride to her home, and she accepted. The defendant also agreed to drive another player on the football team to his home.

"The defendant drove toward the home of the other player, who occupied a rear seat of the car, and the victim sat in the front passenger seat. During the ride, the defendant and the other player made some remarks about the victim's breasts. The defendant also said he intended to have the victim perform oral sex on him.

*547 "After leaving the other player at his home, the defendant drove around for a short while and finally entered a cemetery driveway. He drove to the rear of the cemetery and parked the car. He and the victim kissed for a while, and then he unzipped his pants. At trial the victim testified that

the defendant forced her to perform fellatio, but the trial court concluded that the state failed to sustain its burden of proving beyond a reasonable doubt the element of compulsion.

"On the date of the incident, September 21, 1994, the victim was fourteen years old, her birthday being August 16, 1980. The defendant was sixteen years of age, his birthday being May 9, 1978. The difference between their birthdays is two years, three months and seven days." State v. Jason B., 47 Conn.App. 68, 70-71, 702 A.2d 895 (1997). The defendant was charged in an original information with sexual assault in the first degree in violation of General Statutes § 53a-70 (a)(1); [FN4] sexual assault in the second degree in violation of § 53a-71 (a)(1); see footnote 1 of this opinion; and risk of injury to a child in violation of § 53-21. See footnote 3 of this opinion. The defendant was granted youthful offender status pursuant to General Statutes § 54-76d, [FN5] *548 and a youthful offender information**766 was filed charging him with the same three offenses. Following a trial to the court, the court found that the state had failed to meet its burden of proof on the element of compulsion or force, and acquitted the defendant of sexual assault in the first degree. The court found the defendant guilty of sexual assault in the second degree in violation of § 53a-71 (a)(1), and risk of injury to a child in violation of § 53-21, and adjudged the defendant to be a youthful offender.

FN4. General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse

with another person and such other person is under thirteen years of age and the actor is more than two years older than such person, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present...."

FN5. General Statutes § 54-76d provides: "(a) If the court grants such motion or if the court on its own motion determines that the defendant should be investigated hereunder and the defendant consents to physical and mental examinations, if deemed necessary, and to investigation and questioning, and to a trial without a jury, should a trial be had, the information or complaint shall be held in abeyance and no further action shall be taken in connection with such information or complaint until such examinations, investigation and questioning are had of the defendant. Investigations under sections 54-76b to 54-76n, inclusive, shall be made by an adult probation officer.

When the information or complaint charges commission of a felony, the adult probation officer shall include in the investigation a summary of any unerased juvenile record of adjudications of the defendant.

"(b) Upon the termination of such examinations, investigation and questioning, the court, in its discretion based on the severity of the crime, which shall also take into consideration whether or not the defendant took advantage of the victim because of the victim's advanced age or physical incapacity, and the results of the examinations, investigation and questioning, shall determine whether such defendant is eligible to be adjudged a youthful offender. If the court determines that the defendant is eligible to be so adjudged, no further action shall be taken on the information or complaint and the defendant shall be required to enter a plea of 'guilty'

or 'not guilty' to the charge of being a youthful offender. If the court determines the defendant ineligible to be so adjudged, it shall order the information or complaint to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had."

The defendant appealed from the judgment of the trial court to the Appellate Court, which affirmed the trial court's judgment. State v. Jason B., supra, 47 Conn.App. at 70, 702 A.2d 895. This certified appeal followed. [FN6]

FN6. We granted the defendant's petition for certification to appeal, limited to the following questions: "1. Did the Appellate Court properly conclude that the defendant was 'more than two years older' than the complainant within the meaning of General Statutes § 53a-71 (a)(1) where the defendant on the date of the incident was sixteen years old and the complainant was fourteen years old?

"2. Did the Appellate Court properly conclude that the meaning of the term 'year' in General Statutes § 53a-71 (a)(1) was not unconstitutionally vague and/or violative of the equal protection clause of the United States constitution as applied to the facts of this case?

"3. Did the Appellate Court properly conclude that the state adequately charged the defendant with a violation of General Statutes (Rev. to 1993) § 53-21 (Risk of Injury) under the facts of this case, where a minor may lawfully engage in sexual intercourse in certain circumstances?

"4. Assuming the state properly charged the defendant with a violation of General Statutes (Rev. to 1993) § 53-21, did the Appellate Court properly conclude that it was not unconstitutionally vague as applied to the facts of this case?" State v. Jason B., 243 Conn. 955, 955-56, 704 A.2d 806 (1997).

*549 I

The defendant first claims that he was not "more than two years older" than the victim as is required for a conviction under § 53a-71 (a)(1). Section 53a-71 (a) provides in pertinent part that "[a] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse [FN7] with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person ...." [FN8] (Emphasis added.) **767 Relying on what he terms "common parlance" and on General Statutes § 1-1(i), which provides that the "word 'month' shall mean a calendar month, and the word 'year' a calendar year, unless otherwise expressed," the defendant argues that, for the purposes of construing § 53a-71 (a)(1), "a [sixteen year old] is always within two years of age of a [fourteen year old]...." Therefore, he contends, he did not *550 violate the statute because he "was less than two calendar years older [than the victim]." (Emphasis in original.) We disagree.

FN7. General Statutes § 53a-65 (2) defines "sexual intercourse" as including fellatio.

FN8. Public Acts 1993, No. 93-340, § 2, amended § 53a-71 (a)(1) to exempt from guilt those persons who are not "more than two years older" than the complainant. Prior to that amendment, General Statutes (Rev. to 1993) § 53a-71 provided in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age...." As a result of the amendment, § 53a-71 now provides in relevant part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person

and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person ...." (Emphasis added.)

[1][2][3] "The process of statutory interpretation involves a reasoned search for the intention of the legislature.... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of this case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citation omitted; internal quotation marks omitted.) United Illuminating Co. v. New Haven, 240 Conn. 422, 431, 692 A.2d 742 (1997). Moreover, "[p]enal statutes must be strictly construed ... but such construction must accord with common sense and commonly approved usage of the language." (Citations omitted.) State v. Edwards, 201 Conn. 125, 132, 513 A.2d 669 (1986); see also General Statutes § 1-1(a) (in interpreting statutes words and phrases are "construed according to the commonly approved usage of the language").

[4] We start with the language of the statute, which must be read contextually. Section 53a-71 (a)(1) criminalizes the conduct of an actor who "engages in sexual intercourse with another person ... [who] is thirteen years of age or older but under sixteen years of age [when] the actor is more than two years older than the [victim]...." Determination of illegality under this statute, therefore, requires a comparison of the relative ages of the parties.

Although in other comparative contexts, for example, a comparison of the increase in population growth *551 between

two cities, the use of a calendar year may be appropriate, common sense dictates that in comparing the relative ages of individuals, the difference in their ages is determined by reference to their respective birth dates. In other words, although a person, when asked his age, often will respond with a whole number, for example, "I am forty years old," without specifying how many months have passed since his most recent birthday, it is understood that his exact age actually consists of this abbreviated whole number plus the number of months and days that have passed since the date of his last birthday. This linguistic tendency is best illustrated by the response that ordinarily would be given by one who is asked, not simply how old she is, but how much older she is than someone else. For example, if a woman who was born on January 7, 1950, was asked how much older she is than her husband, who was born on December 7, 1950, in all likelihood she would respond that she is "nearly one year older," or perhaps, "eleven months older," than her husband. She hardly would respond, as the defendant's argument suggests, that neither is "older" than the other simply because they were both born in the same calendar year. Indeed, even twins know how to respond when asked which of them is "older" than the other; they ordinarily will respond based on their birth order, even though when asked their age they ordinarily will respond with the same whole number of years.

[5] Section 53a-71(a)(1) requires a similar comparison between the ages of the **768 parties involved, and contemplates that in determining whether the actor was "more than two years older" than the complainant, the parties' birth dates will be used to calculate the differences in their ages. [FN9] Application of this basic, commonsense *552 principle leads to the conclusion that the defendant, who was born in May, 1978, was "more than two years older" than the victim, who was born in August, 1980.

FN9. This interpretation of § 53a-71 (a)(1) is consistent with the manner in which other statutes requiring a determination of age are construed. For example, General Statutes § 30-86, which governs the sale of alcohol to minors, provides in pertinent part: "Any permittee who, by himself, his servant or agent, sells or delivers alcoholic liquor to any minor ... shall be subject to the penalties of section 30-113. Any person who delivers or gives any such liquors to such minor, except on the order of a practicing physician, shall be fined not more than one thousand five hundred dollars or imprisoned not more than eighteen months, or both...." General Statutes § 30-1(12) defines "minor" as "any person under twenty- one years of age."

General Statutes § 30-89 provides in relevant part: "(a) Any person to whom the sale of alcoholic liquor is by law forbidden who purchases or attempts to purchase such liquor ... shall be fined not less than two hundred nor more than five hundred dollars...." Together, these statutory mandates prohibit the sale of alcohol to persons in Connecticut who have not celebrated their twenty-first birthday, and make it illegal for a person to attempt to purchase alcohol prior to his or her twenty-first birthday. The calculation of age for the purposes of determining eligibility to purchase alcohol, as all tavern owners and most twenty year olds understand, certainly is not measured according to a calendar year. Rather, a person born in January will reach the legal age of consumption prior to a person born in March of the same year, regardless of the fact that they both may have been born during the same calendar year. This makes sense because, similar to § 53a-71 (a)(1), the provision at issue is dependent upon the person's age, and age ordinarily is determined according to a person's date of birth. This principle is evidenced further by the fact that, prior to the changes included in Public Acts 1993, No. 93-139, § 1, "minor" was

defined, for the purposes of the Liquor Control Act, as "any person under twenty-one years of age other than a person who has attained the age of twenty on or before September 1, 1985." General Statutes (Rev. to 1993) § 30-1(20). This reference to the person's birth date would be unnecessary if age was determined according to the calendar year.

The legislative history supports this commonsense interpretation of determining who is "more than two years older" than another for the purposes of criminal liability under § 53a-71. As we have indicated, prior to the amendments to General Statutes (Rev. to 1993) § 53a-71 (a)(1) by No. 93-340, § 2, of the 1993 Public Acts, the age difference between the offender and the victim was irrelevant to the determination of liability under the statute. See footnote 8 of this opinion. The legislative history of Public Act 93-340 indicates that the purpose of exempting from liability those actors *553 who are not more than two years older than their consenting sexual partners who are more than thirteen, but less than sixteen years old, was to reduce the harsh consequences of the criminal law as applied to consenting, sexually active adolescents who were close in age. Explaining the proposed amendments, Representative Richard D. Tulisano stated: "It ... modifies the language of the strictness of our law when the sexual activity is between people within two years age of each other...." 36 H.R. Proc., Pt. 29, 1993 Sess., p. 10,450. Similarly, Representative Moira K. Lyons explained: "[W]e deal with one class of sexual activity which is removed from the statutory rape sanctions in our current statutes and that is where children between the ages of 13 and 18 engage in sexual intercourse and they are within two years of each other in age." Id., p. 10,457. Furthermore, in responding to an inquiry by Senator William A. Aniskovich as to whether the bill "in effect decriminalizes what is now statutory rape so

long as both parties are under ... the statutory rape age ... under current law"; 36 S. Proc., Pt. 13, 1993 Sess., p. 4587; Senator George C. Jepsen replied "[t]hat's pretty close to it with an additional restriction that the two individuals involved be within two years of one another in age. For example, if you have someone **769 who is just short of 18 having sex with someone who is 13 and a month, that would continue to be a crime." Id., p. 4588. Although the hypothetical posed by Senator Jepsen involved parties with an age difference greater than two years, it would have been unnecessary to mention that the younger person was thirteen and one month if, under § 53a-71 (a)(1), the calculation of the differences in age was intended to be measured according to calendar years.

[6] The general purpose of § 53a-71 (a)(1) is to protect victims who are thirteen, fourteen or fifteen years of age, and thus may not have the full measure of maturity *554 to make an intelligent choice regarding sexual intercourse, from being taken advantage of by someone who, because he or she is significantly older, may be able to persuade the victim to engage in physically consensual sexual intercourse. Interpreting "more than two years older than" the victim by comparing actual birth dates is consistent with that purpose. Looking solely at the calendar years in which the defendant and victim were born, as the defendant contends, would be inconsistent with that purpose.

The defendant's attempt to import the statutory definition of "year" in § 1-1(i) as a "calendar year" into the context of § 53a-71 (a)(1), would torture the meaning of "more than two years older" in § 53a-71 (a)(1), and would lead to bizarre and absurd results. Under the defendant's proposed interpretation, the sole determinant of the legality of the intercourse would be the calendar years of the victim's and the defendant's births. In other words, for the purposes of determining the legality of an incident that took place at some

point in 1994, persons born on any day during 1981 would be considered thirteen years of age, and persons born on any day during 1979 would be considered fifteen. Consequently, under this interpretation, only those "older" persons born before 1979, for example, in 1978, would be guilty of violating the statute as a result of having sexual intercourse in 1994 with a victim born in 1981. Furthermore, the defendant's proposed interpretation would mean that, with respect to an incident that occurred on September 1, 1994, a victim born on December 1, 1980, would not be protected from a defendant born on January 1, 1978,--thirty-five months earlier--but a victim born on January 1, 1980, would be protected from a defendant born on December 1, 1977--twenty-five months earlier. We do not read statutes to create such an anomaly.

[7][8] *555 Finally, we are not persuaded by the defendant's reliance on the rule of lenity. "As the United States Supreme Court has noted, [t]he touchstone of this rule of lenity is statutory ambiguity.... [W]e ... [reserve] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.... Moskal v. United States, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990)." (Citations omitted; internal quotation marks omitted.) State v. Hinton, 227 Conn. 301, 317-18, 630 A.2d 593 (1993). This is not such a situation.

II

The defendant next claims that, even if he was two years older than the victim for the purposes of § 53a-71 (a)(1), the statute is unconstitutionally vague as applied to the facts of this case, [FN10] and violates the equal protection clause of the United States constitution. Relying on his contention that the meaning of "two years older" is ambiguous, and on the

fact that there are no prior judicial opinions construing this specific phrase, the defendant argues that § 53a-71 (a)(1) does not provide **770 the fair warning necessary to survive a void for vagueness challenge. The defendant also argues that the proper evaluation of a challenge to a statute based upon alleged vagueness requires an examination of the "particular circumstances" of the case, and that we must consider what "would be 'reasonable' to [the defendant] in his case." With regard to the equal protection clause, the defendant argues that § 53a- 71 (a)(1) violates his right to equal protection under the law in that "it treats a single class of individuals, namely [sixteen year old] minors, differently with respect to their *556 fundamental right to privacy." We conclude that § 53a-71 (a)(1) is not constitutionally vague as applied to the facts of this case, and does not violate the defendant's right to equal protection under the law.

FN10. The defendant expressly "makes no facial challenge to the statute here, but instead asserts that, as a [sixteen year old] youth, the statute is unconstitutionally vague as to him under the facts of this case." (Emphasis in original.)

[9][10][11][12] "In our assessment of whether the statute passes constitutional muster, we proceed from the well recognized jurisprudential principle that [t]he party attacking a validly enacted statute ... bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and we indulge in every presumption in favor of the statute's constitutionality. State v. Ross, 230 Conn. 183, 236, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S.Ct. 1133, 130 L.Ed.2d 1095 (1995). The constitutional injunction that is commonly referred to as the void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute or

regulation and the guarantee against standardless law enforcement. Smith v. Goguen, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Mitchell v. King, 169 Conn. 140, 142-43, 363 A.2d 68 (1975). State v. Schriver, [207 Conn. 456, 459-60, 542 A.2d 686 (1988)]. Thus, [i]n order to surmount a vagueness challenge, a statute [must] afford a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited." (Internal quotation marks omitted.) State v. Payne, 240 Conn. 766, 777, 695 A.2d 525 (1997). Furthermore, "[i]f the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties.... References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Internal quotation marks omitted.) Id., at 778, 695 A.2d 525. [13][14] *557 Applying these principles to the facts of the present case, "our fundamental inquiry is whether a person of ordinary intelligence would comprehend that the defendant's acts were prohibited under [s 53a-71 (a)(1)]." Id. We conclude that a person of ordinary intelligence would understand that a person born in May, 1978, was more than two years older than a person born in August, 1980.

[15][16] The defendant's contention that our vagueness analysis should focus on the warning provided to the average sixteen year old lacks merit. First, the scope of the statute is not confined to defendants of teenage years. Second, vagueness analysis ordinarily does not depend on the individual or categorical capabilities of the defendant. It focuses on the warning that is afforded by the language and its gloss to persons of ordinary intelligence. Although the knowledge possessed by a particular defendant may undermine

a vagueness challenge; see State v. DeFrancesco, 235 Conn. 426, 446, 668 A.2d 348 (1995) (defendant's specific knowledge of dangerous propensities of her felidae contributed to defeat of vagueness challenge); the converse is not true. Lack of knowledge, either by the individual defendant or a person in his particular age category, does not enhance a vagueness challenge.

The defendant also maintains that " § 53a-71 (a)(1) violates [his] right to **771 equal protection under the state [FN11] and federal constitutions in that it treats a single class of individuals, namely [sixteen year old] minors, differently with respect to their fundamental right to privacy. Absent a compelling state interest in such a discriminatory classification, the statute violates the defendant's (and other similarly situated sixteen year olds') right *558 to equal protection of the law." In support of his right to assert, as a minor, a fundamental right to engage in consensual sexual relations, the defendant relies on United States Supreme Court precedent in which the right to privacy has been developed, and on his specific claim that "the constitutional jurisprudence that establishes the right of minors to privacy [has granted] them the right to choose abortions...." According to the defendant, it follows that a fundamental right to privacy with regard "to the activity that necessitated that medical procedure in the first place" should also be recognized. We disagree. [FN12]

FN11. The issue certified for appeal addresses the constitutionality of § 53a-71 (a)(1) under the United States constitution. See footnote 6 of this opinion. We therefore disregard the reference to the state constitution.

FN12. We note that, because § 53a-71 (a)(1) does not expressly mention or limit itself to governing the activities of

sixteen year olds, the defendant's claim can be understood only as a claim of an equal protection violation as applied to him in these factual circumstances, and not on its face. See State v. Angel C., 245 Conn. 93, 125, 715 A.2d 652 (1998) (" '[t]o implicate the equal protection clauses under the state and federal constitutions ... it is necessary that the state statute in question, either on its face or in practice, treat persons standing in the same relation to it differently' ").

"In order to analyze the [defendant's claim], we first must detail the principles applicable to equal protection analysis. State v. Morales, [240 Conn. 727, 738, 694 A.2d 758 (1997)]. First, in general, as in any constitutional challenge to the validity of a statutory scheme, the statut[ory scheme] is presumed constitutional ... and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.... Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

[17][18] "More specifically, [t]o implicate the equal protection [clause] under the ... federal [constitution] ... it is necessary that the state statute [or statutory scheme] in question, either on its face or in practice, treat persons standing in the same relation to it differently.... State v. Morales, supra, 240 Conn at. 738-39, 694 A.2d 758. Thus, the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons *559 similarly situated. Darak v. Darak, 210 Conn. 462, 473, 556 A.2d 145 (1989).

[19][20][21][22] "The equal protection clause does not require absolute equality or precisely equal advantages [between such similarly situated persons].... Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); Daily v. New Britain Machine Co., [200 Conn. 562, 577-78, 512 A.2d 893 (1986)].... To determine whether a particular

classification violates the guarantees of equal protection, the court must consider the character of the classification; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).... Franklin v. Berger, 211 Conn. 591, 595, 560 A.2d 444 (1989). Where ... the classification at issue neither impinges upon a fundamental right nor affects a suspect group [FN13] it will withstand constitutional attack if the distinction is founded on a rational basis. Laden v. Warden, [169 Conn. 540, 543, 363 A.2d 1063 (1975)]; see also McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1972); Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Franklin v. Berger, [supra] [at] **772 595[, 560 A.2d 444]. Rational basis review is satisfied so long as there is a plausible policy reason for the classification.... Johnson v. Meehan, [225 Conn. 528, 536, 626 A.2d 244 (1993)]. [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. D.A. Pincus & Co. v. Meehan, 235 Conn. 865, 877, 670 A.2d 1278 (1996)." (Internal quotation marks omitted.) State v. Wright, 246 Conn. 132, 138-40, 716 A.2d 870 (1998).

FN13. The defendant does not claim that sixteen year olds are a suspect group.

[23] The "analytical predicate" of an equal protection claim is a "determination of who are the persons similarly situated." Id., at 141, 716 A.2d 870. According to the defendant, the *560 classes of persons similarly situated consist of: (1) those sixteen year olds who engage in sexual intercourse with persons two years or less their junior; and (2) those sixteen year olds who engage in sexual intercourse with persons more

than two years their junior. These two groups, however, are not similarly situated for the purposes of equal protection analysis. They have engaged in different conduct: the first, having engaged in sexual intercourse with persons whom the legislature has not deemed to be sufficiently younger than the sixteen year old so as to warrant proscribing such conduct; the second, having engaged in sexual intercourse with persons whom the legislature has deemed to be sufficiently younger than the sixteen year old so as to warrant criminalizing such conduct. Cf. id., at 142, 716 A.2d 870 (defendants who commit different crimes are not similarly situated for equal protection purposes).

Furthermore, with respect to the defendant's argument that there is no legally significant difference between a person who is sixteen and a person who is sixteen and three months, we agree with the Appellate Court that "the same claim can be raised against any statute that draws a precise line based on age. We are not aware of any authority that has invalidated a statute simply because it makes no allowance for persons who exceed the statutory limit by only a few months." State v. Jason B., supra, 47 Conn.App. at 81, 702 A.2d 895.

Thus, the defendant's argument "is ill-suited to the framework of equal protection analysis. In our view, as a matter of analytical categorization, it would have been brought more appropriately as a substantive due process claim. See State v. Matos, [240 Conn. 743, 749, 694 A.2d 775 (1997)] ('[t]he guarantee of substantive due process requires that a law be reasonable, rather than arbitrary or capricious, and that its operation has a real and substantial relation to the object to be obtained' *561 ...)...." (Citation omitted.) State v. Wright, supra, 246 Conn. at 143, 716 A.2d 870.

[24] This conclusion requires us to consider the defendant's claim that he has a fundamental right of privacy to engage in consensual sexual relations. If he is correct, we must apply

strict scrutiny analysis to the defendant's claim; if he is incorrect, his claim must be accorded rational basis review. We conclude that rational basis review applies to the defendant's claim.

Initially, we note that the defendant challenges the constitutionality of the statute as applied to him; he does not make a facial claim. See footnote 10 of this opinion. It borders on the frivolous, however, to say that one has a right of privacy to engage in consensual sexual intercourse in a cemetery driveway during the late afternoon or early evening, as occurred in this case. Cf. General Statutes § 53a-186 (statutory provision criminalizing sexual conduct in public places).

Next, it is a dubious assertion at best that the constitution provides sixteen year olds the fundamental right to engage in consensual sexual relations. The defendant offers no authority for this proposition, and it cannot be drawn by analogy to those cases dealing with procreation or abortion. A pregnant minor female's right to have an abortion, under certain circumstances, is hardly analogous to the purported "**773 right" of a sixteen year old to engage in sexual intercourse. [FN14]

FN14. The dissimilarities between the right to have an abortion and the right to engage in sexual intercourse in a public place are obvious. We therefore need not address whether the defendant is accurate in his characterization of United States Supreme Court precedent, but do note that, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), cited by the defendant for the proposition that minors have been granted the right to have abortions, the court stated: "We emphasize that our holding ... does not suggest that every minor, regardless of age or maturity, may give effective

consent for termination of her pregnancy." Thus, to the extent that Danforth recognized certain minors' right to an abortion, the right is not absolute.

*562 Furthermore, consensual sexual intercourse, by definition, requires at least two actors. Thus, the proper question in this case is not whether the sixteen year old defendant had a fundamental right to engage in consensual sexual intercourse. The proper question is whether he had a fundamental right to engage in such conduct with the fourteen year old victim. It exceeds the frivolous to suggest that the constitution provides such a right. The proper standard, therefore, is rational basis review. [25] "Rational basis review is satisfied so long as there is a plausible policy reason for the classification.... [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature." (Citation omitted; internal quotation marks omitted.) State v. Wright, supra, 246 Conn. at 139-40, 716 A.2d 870. The reasons cited by the Appellate Court, namely, the prevention of teenage pregnancy, and the limitation of the opportunity of the more sexually experienced adolescents to take advantage of those much younger; State v. Jason B., supra, 47 Conn.App. at 81, 702 A.2d 895; provide a rational basis for a legislative distinction based on whether a person is more or less than two years older than the younger party for the purposes of determining the legality of sexual intercourse under § 53a-71 (a)(1).

III

The defendant next claims that the state failed to charge him adequately [FN15] and prove him guilty of violating § 53-21. See footnote 3 of this opinion. The defendant asserts that, as a result of Public Act 93-340; see *563 footnote 8 of this opinion; "it is no longer enough simply to state that sexual intercourse with a person under [sixteen] conclusively

establishes a situation likely to impair morals." According to the defendant, "the state was required to allege and prove more in count three than the mere fact that [the victim] was less than [sixteen] years old." Thus, the defendant contends, because the state failed: (1) to incorporate by reference any of the specific allegations of age contained in the first two counts of the complaint; (2) to meet its burden of proof on the elements of compulsion or force; and (3) to "allege physical injury or transmission of a disease or some other harm beyond the mere fact of intercourse"; the defendant was not "on notice that he was exposed to a conviction for risk of injury for engaging in consensual intercourse solely because of [the victim's] status as a minor, without regard to [the defendant's] age." Furthermore, the defendant claims that because "[t]he state never alleged in the third count that its theory of liability for risk of injury was **774 based upon the fact that [the defendant] was 'more than two years older' than [the victim], nor did it seek, as the basis for criminal liability, to incorporate his birth date from the second count by reference ... there was insufficient evidence to sustain the conviction...." We are unpersuaded.

FN15. In the third count of its information, the state accused the defendant of "having committed the crime of INJURY OR RISK OF INJURY TO A MINOR in violation of [General Statutes (Rev. to 1993)] § 53-21" and specifically alleged that "on or about September 21, 1994 ... at or near the Enfield Street Cemetery ... the [defendant] willfully and unlawfully caused a child under the age of sixteen (16) years, namely, [the victim] age 14, to be placed in a situation where her morals were likely to be impaired and did act or acts likely to impair the morals of said child, namely, transporting her into an isolated area where he compelled her to engage in sexual intercourse and by engaging in sexual intercourse with

her, all in violation of [General Statutes (Rev. to 1993) § 54-76b]."

[26] As an initial matter, the state argues that because the defendant did not challenge the validity of the information prior to the trial court's youthful offender adjudication, we must construe the information favorably to the state. We agree. [FN16]

FN16. On April 19, 1995, the defendant challenged the information with regard to the charge under § 53a-71. The defendant's motion to dismiss the information was based on his claim that " 'more than two years older than such person' " under § 53a-71 (a)(1) should be construed to mean that an accused "must be at least three years older than the 'other person,' " to fall within the statute. Thus, the defendant alleged that "since the issue of age is an element of the offense, the Information is defective.... The arrest warrant references the alleged victim's age as being that of fourteen years. There is no reference to her date of birth. In addition, the age of the defendant is not even mentioned in the arrest warrant application." This motion to dismiss, however, did not address the state's allegations under § 53-21.

[27] *564 In State v. McMurray, 217 Conn. 243, 250, 585 A.2d 677 (1991), we held that "[w]hen reviewing a claim, not raised prior to the verdict, that an information fails to charge all the essential elements of an offense, we must construe the information liberally in favor of the state." In the present case, although the defendant did challenge, prior to trial, the validity of the information with regard to the charge under § 53a-71 (a)(1); see footnote 16 of this opinion; he did not challenge, prior to trial, the validity of the information with regard to the charge under § 53- 21. [FN17] Thus, a

construction of the information in favor of the state is appropriate with respect to the charge under § 53-21. "Under the applicable standard of review, a conviction based upon a challenged information is valid unless the information is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." (Internal quotation marks omitted.) State v. McMurray, supra, at 250, 585 A.2d 677.

FN17. Indeed, the record discloses that, with regard to the charge under § 53-21, the defendant did not challenge the information in the trial court at all, even after trial. He did not raise that claim until his appeal in the Appellate Court.

The defendant claims, in effect, that when the legislature expressly amended General Statutes (Rev. to 1993) § 53a-71 (a)(1) in 1993 to include an exemption from criminal liability for those persons engaging in consensual sexual intercourse with persons not more than two years their junior, it also implicitly modified the activities proscribed by General Statutes (Rev. to 1993) § 53-21. Section 53-21, on its face, is concerned only with the age of the victim, and criminalizes certain *565 actions based upon the fact that the victim is under the age of sixteen. See footnote 3 of this opinion. The express language of § 53-21, therefore, does not require any consideration of the age of the defendant for the purposes of determining criminal liability. The defendant argues, however, that as a result of the 1993 amendments to General Statutes (Rev. to 1993) § 53a-71 (a)(1), in order to allege sufficiently and prove guilt under § 53-21, the language of the statute notwithstanding, [FN18] the state must also allege and prove that the defendant was more than two years older than the victim.

FN18. The defendant does not address the discrepancy between his interpretation and the plain language of § 53-21.

[28][29][30] We have characterized legislative actions as implicitly amending a statute only when the legislative history contains a very strong showing of the legislators' intent to do so. "When changes have been introduced by amendment **775 to a statute, the presumed change does not go any further than that which is expressly declared or necessarily implied.... We cannot impute to the legislature ... in the absence of an intent clearly expressed in the act, [an intent] to enact [a statute] which involves a departure from existing statutory law." (Citation omitted; internal quotation marks omitted.) Iovieno v. Commissioner of Correction, 242 Conn. 689, 699- 700, 699 A.2d 1003 (1997). There is no indication in the legislative history of Public Act 93-340 that in amending General Statutes (Rev. to 1993) § 53a- 71, the legislature also intended to amend the scope or meaning of General Statutes (Rev. to 1993) § 53-21.

[31] We therefore consider whether the information was "so obviously defective that by no reasonable construction [could] it be said to charge the offense for which conviction was had." (Internal quotation marks omitted.) State v. McMurray, supra, 217 Conn. at 250, 585 A.2d 677. The third count of the information charged that, on the particular *566 date and at the particular place in question, the defendant wilfully and unlawfully committed acts likely to impair the morals of the fourteen year old victim, namely, by engaging in sexual intercourse with her in violation of § 53-21. This information met the McMurray standard. [FN19]

FN19. By this limited conclusion, we do not suggest that the same information would not also meet a more exacting standard required by a timely challenge to it.

IV

Finally, the defendant argues that § 53-21 is unconstitutionally vague as applied to the facts of this case [FN20] because the statute "and its judicial gloss fail[ed] to provide the defendant with fair warning that his conduct was illegal." [FN21] More specifically, the defendant contends that "[a]lthough mistake as to the 'victim's' age is no defense ... it is reasonable that a [sixteen year old] would believe that he did not impair a [fourteen year old] partner's morals under § 53-21 to engage in the sexual conduct at issue here." (Citation omitted.) Thus, the defendant maintains, in the absence of either plain language or an appropriate judicial gloss on the statute, "the defendant could not possibly have known that his conduct could lead to criminal liability under § 53-21."

FN20. The defendant expressly disclaims any facial vagueness claim.

FN21. The defendant also attempts to revive, under this claim, variations on his earlier theme that § 53-21 does not apply to the facts of this case because: (1) in the absence of compulsion or some other harmful result, § 53-21 requires that the defendant be more than two years older than the victim; and (2) engaging in sexual intercourse with a victim not more than two years younger cannot constitute conduct "ipso facto likely to impair the morals of [the victim]." We already have
rejected the first claim on its merits; see part III of this opinion; and neither claim is within the fourth certified question, which does not concern the applicability of the statute and focuses, instead, on the statute's purported vagueness as applied to the facts of this case. We therefore decline either to revisit the first claim or to address the second claim.

[32] The state argues that the Appellate Court properly concluded that "at the time of the offense the defendant *567 did have fair notice of the criminality of his conduct from the terms of the statute and from judicial opinions interpreting its terms," and that, therefore, § 53-21 is not void for vagueness as applied to the facts of this case. State v. Jason B., supra, 47 Conn.App. at 86, 702 A.2d 895. We agree with the Appellate Court and the state. We reiterate that, "[i]f the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties." (Internal quotation marks omitted.) State v. Payne, supra, 240 Conn. at 778, 695 A.2d 525. Moreover, when considering a "void for vagueness claim ... our fundamental **776 inquiry is whether a person of

ordinary intelligence would comprehend that the defendant's acts were prohibited...." Id. As we concluded in part II of this opinion, although a particular defendant's special knowledge may undermine his or her vagueness challenge, a particular individual or categorical defendant's lack of knowledge may not be used to enhance such a challenge. Thus, the defendant's reliance on what a sixteen year old actor would or would not believe is unavailing.

[33] It is well settled that § 53-21 "proscrib[es] two general types of behavior likely to injure physically or impair the morals of a minor under sixteen years of age: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the minor's moral or physical welfare and (2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being." (Internal quotation marks omitted.) State v. Perruccio, 192 Conn. 154, 159, 471 A.2d 632, appeal dismissed, 469 U.S. 801, 105 S.Ct. 55, 83 L.Ed.2d 6 (1984). We conclude that the defendant had notice that engaging in sexual intercourse with a fourteen year old victim constituted an act "directly perpetrated on the person of the minor and injurious to [her] moral or *568 physical well-being." (Internal quotation marks omitted.) Id.

As the Appellate Court noted, as a result of several Appellate Court decisions construing § 53-21, "there existed a significant

judicial gloss with respect to § 53-21, of which the defendant must be presumed to have been aware, to the effect that the act of having sexual intercourse with a child under sixteen years of age was a violation of the statute, regardless of whether there was consent by the child." State v. Jason B., supra, 47 Conn.App. at 85, 702 A.2d 895; see, e.g., State v. Plude, 30 Conn.App. 527, 530, 621 A.2d 1342, cert. denied, 225 Conn. 923, 625 A.2d 824 (1993) (vaginal intercourse and fellatio); In re John C., 20 Conn.App. 694, 695, 569 A.2d

1154 (1990) (defendant standing before victim with his hands on her head and his erect penis exposed); State v. Thomas, 19 Conn.App. 44, 46, 560 A.2d 486 (1989) (defendant put his hand under victim's underwear and fondled her vaginal area).

We are not persuaded, moreover, by the defendant's reliance on Perruccio for his vagueness challenge to § 53-21. The flaw in the statutory scheme considered in State v. Perruccio, supra, 192 Conn. at 163, 471 A.2d 632, was that the age of consent of the victim under General Statutes (Rev. to 1979) § 53a-71 (a)(1) conflicted with the age of consent under General Statutes (Rev. to 1979) § 53-21 and, therefore, § 53-21 was vague as applied to the facts of that case. [FN22] In the present case, however, as the *569 Appellate Court properly concluded: "The defendant's reliance on Perruccio is misplaced ... because in this case there is no conflict between the statutes with respect to the age of consent. Both §§ 53-21 and 53a- 71 (a)(1) apply to the protected class of children under sixteen years. Within that class, the latter statute creates an exemption when the actor is not more than two years older than the person with whom sexual intercourse occurred. The defendant clearly does not qualify for that exemption because he is more than two years older than the victim." State v. Jason B., supra, 47 Conn.App. at 83-84, 702 A.2d 895.

FN22. At the time the crimes in Perruccio occurred, General Statutes (Rev. to 1979) § 53a-71 (a) provided in pertinent part:

"A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under fifteen years of age ...." (Emphasis added.) General Statutes (Rev. to 1979) § 53-21, however, penalized "[a]ny person who wilfully or

unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered...." (Emphasis added.) Although the legislature had made technical changes to § 53a-71, the statute remained substantively the same until 1985, when this conflict was remedied by Public Acts 1985, No. 85-341, which amended § 53a-71 (a)(1) to increase the applicable age from fifteen to sixteen years of age.

**777 [34] For the same reasons articulated in part III of this opinion, we similarly are unpersuaded by the defendant's claim that the 1993 amendments to General Statutes (Rev. to 1993) § 53a-71 (a)(1) render the activities proscribed under § 53-21 vague. The defendant argues that, by enacting the 1993 amendments to General Statutes (Rev. to 1993) § 53a-71, the legislature categorically reduced the age of consent to sexual intercourse to thirteen, and thereby "in effect, deemed [fourteen year olds] capable of consenting to intercourse...." As discussed previously, the 1993 amendments to General Statutes (Rev. to 1993) § 53a-71 (a)(1) did not amend General Statutes (Rev. to 1993) § 53-21. Rather, the legislative history suggests that the safe harbor exemption was added solely to ameliorate the harsh results of the criminal law as it was being applied to consenting, sexually active adolescents who were close in age. As the Appellate Court correctly pointed out, "[n]o legislator contended that a person qualifying for the exemption would be less likely to impair the morals of a child." State v. Jason B., supra, 47 Conn.App. at 84, 702 A.2d 895. Moreover, unlike the situation presented to this court in State v. Perruccio, supra, 192 Conn. at 164, 471 A.2d 632, where the legislators' *570 actions had "clearly indicated [a determination] that a person who had attained the age of fifteen was an adult capable of making an intelligent choice in matters relating to sex," there is

absolutely no indication in the 1993 legislative history that the legislature deemed a person age fourteen categorically capable of consenting to engage in sexual intercourse, irrespective of the age of the partner. Indeed, the legislative history is to the contrary.

The judgment of the Appellate Court is affirmed.

In this opinion CALLAHAN, C.J., and KATZ and PETERS, JJ., concurred.

CONCURRING/DISSENTING OPINION

McDONALD, J., concurring in part and dissenting in part. I disagree with the majority's conclusion that the defendant is "more than two years older" than the victim in this case. Thus, I would reverse the defendant's conviction of sexual assault in the second degree under General Statutes § 53a-71 (a)(1). However, I agree with the majority that the defendant's conviction of risk of injury to a child under General Statutes (Rev.to 1993) § 53-21 must be upheld. The legislature has liberalized this state's statutory rape law by exempting from prosecution those whose age is within two years of the age of the younger victim. In seeking to exempt older teenagers from criminal liability for sexual relations with children from thirteen up to sixteen years of age, the legislature exempted from liability teenagers who are not two years older than their partners. Whether it was wise or unwise to exempt from criminal liability sexual relations with a thirteen year old, that policy determination is made by the legislature as the representative of the people and not by this court. See In re Baby Z., 247 Conn. 474, 533, 724 A.2d 1035 (1999) (McDonald, J., concurring).

*571 The defendant was sixteen years of age at the time of

this incident and the victim was fourteen years of age. If one calculates the years, months, weeks and days between their respective birth dates, the defendant has lived more than two years than the victim has lived. If we were to consider the victim fourteen "years of age" for the entire year that she was fourteen and the defendant sixteen "years of age" for the entire year that he was sixteen, however, the defendant would not have been more than two years older than the victim at the time of the incident. It is true that there are more than two years between the defendant's birthday and the victim's birthday, but most people commonly refer to "years of age" as just that and do not compute months, weeks, days, hours, minutes and seconds in their age. In discussing the pertinent legislation, **778 in fact, the legislators referred to the parties' age in terms of "years in age" or "years of age." Representative Richard D. Tulisano stated that the 1993 amendment to the statute "modifies the language of the strictness of our law when the sexual activity is between people within two years of age of each other...." 36 H.R. Proc., Pt. 29, 1993 Sess., p. 10,450. Representative Moira K. Lyons stated that sexual activity in which "children between the ages of thirteen and eighteen engage in sexual intercourse and ... are within two years of each other in age" is "removed from statutory rape sanctions." Id., p. 10,457. Senator George C. Jepsen also stated that the exemption applied if "the two individuals involved [are] within two years of one another in age." 36 S. Proc., Pt. 13, 1993 Sess., p. 4588.

Under the majority's reading of the exemption, it applies only to those whose birthdays are not more than two years apart chronologically; thus, the hour and perhaps minute or second of one's birth could result in criminal liability for teenage sex. If the victim and the defendant share the same birth date, two years *572 apart, but the defendant was born a few minutes or

seconds earlier than the time at which the victim was born, the defendant would be liable under the majority's analysis. As this case illustrates, some sixteen year olds may be more than two years older than some fourteen year olds but some may not. I can not believe that the legislature intended such an impractical and unrealistic cutoff where the potential for severe criminal penalties is great. I believe that the legislature intended to create a criminal law that could be practically and sensibly applied and obeyed. Cf. State v. Pickering, 180 Conn. 54, 59-61, 428 A.2d 322 (1980).

I would reverse the defendant's conviction of sexual assault in the second degree. [FN1] I concur in parts III and IV of the majority opinion, however, and would uphold the defendant's conviction of risk of injury to a child.

FN1. In doing so, I need not address part II of the majority opinion.

STATE OF CONNECTICUT
SUPREME COURT

NO. S.C. 15841
STATE OF CONNECTICUT

V.

JASON B. JUNE 16, 1999

ORDER

THE MOTION OF THE DEFENDANT, FILED MAY 14, 1999, FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY

O R D E R E D **DENIED.**

BY THE COURT,

/S/ FRANCIS DRUMM
CHIEF CLERK